THE HIGH COURT

[2012 No. 357 MCA]

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 (S.I. 133/2007)

AND IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007

BETWEEN

NATIONAL ASSET MANAGEMENT AGENCY

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 19th day of April 2013

1. On the 27th day of February 2013, I gave my judgment in the substantive proceedings, deciding that the appellant was a public authority for the purposes of the Regulations named in the title of these proceedings. The appellant has informed me that it wishes to appeal this decision and it now seeks a stay on the operation of my decision. Not surprisingly, the respondent has adopted a neutral position on this application.
2. The decision of the respondent on the question of whether the appellant was a public authority for the purposes of the Regulations was precipitated by an information request made by Mr. Gavin Sheridan who is not a party to these proceedings. Given that any stay which the court might grant would directly impact on his request for information, I adjourned the application for a stay to

facilitate any submissions which Mr. Sheridan might make. In the event, Mr. Sheridan has made helpful written and oral submissions to the court.

3. Before I refer to the principles which govern the grant of a stay pending an appeal to the Supreme Court, I think it relevant to refer to Mr. Sheridan's original request for information and also to the rules in the Regulations as to how such requests are to be treated.

4. By request dated 3rd February, 2010, Mr. Sheridan asked NAMA, in accordance with Regulation 6 of the above entitled Regulations, for information as follows:

> "1. A breakdown of all assets, loans and properties due to be transferred to the Agency. This should include the value placed on the asset and by whom. It should include the address of all assets and properties.
>
> 2. A breakdown of all properties and property loans currently owned or controlled by the Agency.
>
> 3. Minutes of board meetings related to the transfer of assets and properties to the Agency. The date range for this request is January 2009 to January 2010, inclusive."

5. NAMA refused to give the information sought on the basis that it was not a public authority within the meaning of the Regulations. Mr. Sheridan appealed that decision to the respondent in these proceedings and ultimately I decided that the respondent had correctly interpreted the Regulations and that NAMA was a public authority as defined.

6. The Regulations define "environmental information" in the following terms:

> "'Environmental information' means any information in written, visual, aural, electronic or any other material form on-

(a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,

(b) Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,

(c) Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,

(d) Reports on the implementation of environmental legislation,

(e) Cost benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);"

7. I note that the only decision that has been taken by NAMA on Mr. Sheridan's request for information is that NAMA is not a public authority. Mr. Sheridan, in his submissions to this court, not unsurprisingly expresses some disappointment that in excess of 1,000 days after his request for information, no substantive response has been made by NAMA.

8. Regulations 8 and 9 deal with the circumstances in which a request for public information may or must be refused. Regulation 8 provides that a public authority shall not make available environmental information where its disclosure would adversely affect the confidentiality of personal information of someone who has not consented to such disclosure, or which would adversely affect the interests of any person who supplied the information requested, *inter alia*. Regulation 9 provides discretionary grounds for the refusal of information. A request may be refused if it would adversely affect, for example, commercial or industrial confidentiality. In addition, a request may be refused where it "is manifestly unreasonable, having regard to the volume and range of information sought, or where the request remains formulated in too general a manner".

9. It is of some significance in this application for a stay that NAMA has never taken any of the decisions which are open to it in response to the particular request for information made by Mr. Sheridan. Contrary to what was suggested, it seems to me that it would not be overly burdensome on NAMA to decide, for example, whether or not the information sought comprises environmental information within the meaning of the Regulations. Once this decision is taken, it may not be overly burdensome to decide whether any of the Regulation 8 or 9 grounds for refusing information apply.

10. It is apparent to me that the mere fact that I have decided that NAMA is a public authority for the purpose of the Regulations does not automatically require the appellant to provide the information sought by Mr. Sheridan.

Principles Governing Granting or Withholding a Stay

11. The appellant refers to the decision of Clarke J. in *Danske Bank A/S trading as National Irish Bank v. McFadden* [2010] IEHC 119 where the principles governing the grant or the withholding of a stay pending an appeal are usefully set out. These in turn have been usefully and correctly summarised by Mr. Sheridan in his written submissions as follows:

"a. For a stay to be considered the appeal must be *bona fide* and the court should rely on the legal advisors of those seeking a stay to assist the court in the reality of an appeal;

b. the court should balance the relative prejudices flowing from granting or not granting a stay, and

c. where there is conflicting detriment to parties then the court should consider a stay on terms or the imposition of terms which would ameliorate the potential detriment."

12. To this useful summary of the *Dankse Bank* decision, I wish only to refer to the *dicta* of Clarke J. in *Danske Bank* where he explains that:

"Where the appeal is genuine, it seems clear from *Ingersoll* that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction . . . In the words of McCarthy J. in *Redmond,* the

court is, in those circumstances, required to 'maintain a balance so that justice will not be denied to either party'."

13. The reference by Clarke J. to the applicability of an injunction-style test to aid with a decision on the grant or withholding of a stay prompted me to consider the recent judgment of the Supreme Court in *Okunade v. The Minister for Justice, Equality and Law Reform* [2012] IESC 49, where the Supreme Court considered the applicability of the criteria for granting or refusing injunctions in the public law arena. Speaking for the court, Clarke J. said as follows:

"As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) Give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;

(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and

(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also

(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful."

As this application for a stay arises in the public law arena, some of these considerations might be applicable in the context of an application for a stay on the operation of a decision of the High Court relative to the perforamce of public duties and the meaning of certain public law rules.

14. In determining the respective prejudices which might result in a decision on a stay, I have had regard to the following factors.

15. If I grant a stay to NAMA, it may be many years before Mr. Sheridan's request for information progresses even to the next stage of consideration. The number of appeals awaiting determination in the Supreme Court seems to cause delays of somewhere between three and five years. Nothing in this case suggests that the appeal might be treated as an urgent matter requiring an early hearing in the Supreme Court.

16. NAMA decided to dismiss Mr. Sheridan's 2010 request for information on a threshold issue as to whether or not it was a public authority. No other decision has ever been taken by NAMA on his requeust even though it could have decided whether or not the information he sought comprised environmental information as defined and whether or not any of the mandatory or discretionary grounds for refusal of information were applicable. Thus, by framing its refusal so narrowly, NAMA have effectively neutralised the whole of Mr. Sheridan's request and have ensured that the process is likely to take further time and result in further appeals to the Information

Commissioner. The elongation of the process for deciding Mr. Sheridan's request seems to be the direct result of the unnnecessarily narrow approach adopted by NAMA in determining the request.

17. No substantive argument or fact has been put before me which would persuade me that dealing with Mr. Sheridan's request will cause an undue burden, either administratively or financially to NAMA. If it were the case that dealing with his request would cause such difficulties, such an argument should have been made in detail and possibly by affidavit evidence.

18. Processing Mr Sheridan's request will not unfairly invade third party rights as these are well protected by the rules.

19. I am persuaded that in this case, the balance of justice lies with refusing the stay. I so decide because this does not necessarily mean that NAMA must give Mr. Sheridan the information he requires. It merely means that it must begin the process of dealing with his request. There is much administrative armoury available to NAMA to protect itself from a request which relates to something other than environmental information; a request that is too broad; a request that invades financial confidences, *etc.* It seems to me that an organisation as resourced and staffed as NAMA should be well capable of protecting itself from any unreasonable or unlawful request and no argument has been made that irreparable harm will be done to NAMA if it answers the request in circumstances where it transpires that it was not a public authority. Obviously it will have been put to the trouble and expense of answering the request but given the capacity of the organsiation, such disadvantage is one it can easily absorb. I should also add that if it transpires that Mr Sheridan's request does relate to environmental information as defined and if it further trasnpires that

none of the exceptions apply, it would be open to NAMA at that stage to renew its application for a stay in Supreme Court, should it feel that giving the information will cause irreparable harm. My view is that NAMA suffers no harm from processing the application at least to the point of discovering what information, if any, must be disclosed.

20. Finally, at the hearing of the application for a stay, I sought views as to whether a stay might be granted generally, but excepting Mr. Sheridan's request. My understanding is that counsel for NAMA thought this might be unfair to the public and therefore I have dismissed this as a possible restriction on the stay which I now refuse.

Approved Mr. Justice Mac Eochaidh

18.IV.13